May 22, 2003
DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Appeal

Name of Petitioner: Egan & Associates

Date of Filing: April 4, 2003

Case Number: TFA-0027

On April 4, 2003, Egan & Associates (Egan) filed an Appeal from a determination that the Acting Assistant General Counsel for General Law of the Department of Energy (DOE/GC) issued in response to a request for documents that Egan submitted under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, as implemented by DOE in 10 C.F.R. Part 1004. DOE/GC issued the determination on March 5, 2003. This Appeal, if granted, would require that DOE/GC release additional responsive information to Egan or provide a detailed explanation of its reasons for withholding such material.

I. Background

On August 6, 2002, Egan requested from DOE "copies of documents and videotape recordings in the possession of DOE pertaining to the United States Office of Government Ethics ('OGE') opinion letter dated July 31, 2002, addressed to DOE and the United States Nuclear Regulatory Commission ('NRC') concerning the application of 18 U.S.C. 207 to personnel who have worked on the Yucca Mountain project." Appeal at 1. DOE/GC responded to Egan's request on March 5, 2003, stating that it had located 127 pages of material that was responsive to Egan's request. With its determination, DOE/GC released 36 of the 127 pages in their entirety to Egan (pages #1-36). However, the remaining 91 pages were withheld either in part (pages #37-118) or in their entirety (pages #119-127), pursuant to FOIA Exemptions 5 and 6. Letter from Susan F. Beard, Acting Assistant General Counsel for General Law, to Charles Fitzpatrick, Egan & Associates (March 5, 2002) ("Determination Letter").

Egan filed its appeal with the OHA on April 4, 2003. In the appeal, Egan states,

> I have no quarrel with DOE's withholding of a *de minimus* amount of information (including personal telephone numbers) from disclosure by DOE under Exemption 6 (5 U.S.C. § 552(b)(6)). The basis upon which this appeal is brought is DOE's failure to follow its own regulations and the pertinent provisions of the [FOIA] by withholding from disclosure part or all of some 91 pages of the 127 pages of documents responsive to my FOIA request. The relief I seek is the requirement that DOE release in full the remaining 91 pages withheld in whole or in part by DOE,

purportedly pursuant to Exemption 5 (5 U.S.C. § 552(b)(5); 10 C.F.R. 1004.10(b)(5)).

Appeal at 1-2.[1]

First, we note that of the 91 pages from which information was withheld, 32 originated in either NRC (24 pages) or OGE (8 pages). With regard to the pages originating at other agencies, DOE/GC informed Egan that it could appeal the withholding from those pages to the respective agencies, and provided Egan with addresses and instructions for doing so. Thus, the present decision will address only the withholdings under FOIA Exemption 5 from the 58 pages (those considered "DOE records"[2]), found in 17 documents (numbered 16-25, 33, 34, 36, 38-41 in the documents index provided to the requester).

II. Analysis

The FOIA generally requires that records held by federal agencies be released to the public upon request. 5 U.S.C. § 552(a)(3). However, the FOIA lists nine exemptions that set forth the types of information that an agency may withhold. 5 U.S.C. § 552(b)(1)-(9); 10 C.F.R. § 1004.10(b)(1)-(9). These nine exemptions must be narrowly construed. *Church of Scientology of California v. Department of the Army*, 611 F.2d 738, 742 (9th Cir. 1980) (citing *Bristol-Meyers Co. v. FTC*, 424 F.2d 935 (D.C. Cir.), *cert. denied*, 400 U.S. 824 (1970)). In addition, DOE regulations provide that the agency should release to the public material exempt from mandatory disclosure under the FOIA if the DOE determines that federal law permits disclosure and if disclosure is in the public interest. 10 C.F.R. § 1004.1. Accordingly, even if a document can properly be withheld under an exemption, we must also consider whether the public interest demands disclosure pursuant to DOE regulations.

A. Application of Exemption 5

Exemption 5 shields from mandatory disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). This Exemption is generally recognized as encompassing the attorney-client, attorney work product and governmental deliberative process privileges. See, e.g.,

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[1] In its appeal, Egan also contends that DOE/GC did not comply with various requirements of the DOE FOIA regulations at 10 C.F.R. § 1004.5(d), "Time for processing requests." Because DOE/GC has now issued its determination, we consider the issues raised by these arguments to be moot. We also note that the relief sought by Egan is not related to these issues, but rather to DOE/GC's withholding of information, which shall be the focus of this decision.

[2] *See* 10 C.F.R. 1004.4(f)(2) ("Requests for DOE records containing information received from another agency, or records prepared jointly by DOE and other agencies, will be treated as requests for DOE records . . ."). Though these documents are designated "DOE records" for purposes of this appeal, many of these records are documents that were received from either OGE or NRC and then edited (either electronically or by hand) by DOE officials.

Coastal States Gas Corp. v. DOE, 617 F.2d 854 (D.C. Cir. 1980). In the present case, DOE/GC relied upon the deliberative process and attorney-client privileges of Exemption 5.

The deliberative process privilege permits the withholding of responsive material that reflects advisory opinions, recommendations, and deliberations comprising part of the process by which government decisions and policies are formulated. *NLRB v. Sears, Roebuck &* Co., 421 U.S. 132, 149 (1974). It is intended to promote frank and independent discussion among those responsible for making governmental decisions. *EPA v. Mink*, 410 U.S. 73, 87 (1973); *Kaiser Aluminum & Chemical Corp. v. United States*, 157 F. Supp. 939 (Ct. Cl. 1958). In order to be shielded by Exemption 5, a record must be both predecisional, i.e., generated before the adoption of agency policy, and deliberative, i.e., reflecting the give-and-take of the consultative process. *Coastal States Gas Corp. v. Department of Energy*, 617 F.2d 854, 856 (D.C. Cir. 1980). This privilege covers records that reflect the personal opinion of the writer rather than final agency policy. *Id.* Consequently, the privilege does not generally protect records containing purely factual matters.

The attorney-client privilege exists to protect confidential communications between attorneys and their clients made for the purpose of securing or providing legal advice. *Mead Data Central, Inc. v. Department of Air Force*, 566 F.2d 242, 252 (D.C. Cir. 1977) (*Mead*); *California Edison*, 28 DOE ¶ 80,173 (2001) (*California Edison*). The privilege covers facts divulged by a client to his or her attorney, and also covers opinions that the attorney gives the client based upon those facts. *Mead*, 566 F.2d at 254 n.25. The privilege permits nondisclosure of an attorney's opinion or advice in order to protect the secrecy of the underlying facts. *Id.* at 254 n.28. Not all communications between an attorney and client are privileged, however. *Clark v. American Commerce National Bank*, 974 F.2d 127 (9th Cir. 1992). The privilege is limited to those disclosures necessary to obtain or provide legal advice. *Fisher v. United States*, 96 S.Ct. 1569, 1577 (1976). The privilege does not extend to social, informational, or procedural communications between attorney and client. *California Edison*, 28 DOE at 80,665. "Where the client is an organization, the privilege extends to those communications between attorneys and all agents or employees of the organization who are authorized to act or speak for the organization in relation to the subject matter of the communication." *Mead*, 566 F.2d at 253 n.24.

The Appellant raises objections to the application of each privilege. First,

> DOE's rationale for withholding documents for the purpose of 'shielding governmental deliberations' is arbitrary and capricious and unsubstantiated by the facts. The facts are that DOE solicited an ethics opinion from the Office of Government Ethics with respect to a particular set of circumstances. OGE is assigned the responsibility for just such assessments. DOE is **not** deciding, or "deliberating" the issue which it presented to OGE for its assessment. OGE is. Any DOE "deliberations" are irrelevant. DOE points out that a purpose of the deliberative process is to encourage open discussions on matters of policy "between subordinates and superiors." That rationale might apply to communications between subordinates and superiors within OGE (the agency doing the deliberating), but not

> communications by DOE lobbying OGE for a favorable decision on the very issue presented to OGE by DOE.

Appeal at 3-4. We disagree. As DOE/GC stated in its determination letter, "'Pre-decisional' documents are not only those circulated within the agency, but can also be those from an agency lacking decisional authority which advises another agency possessing such authority." Determination Letter at 2. *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 188 ("By including inter-agency memoranda in Exemption 5, Congress plainly intended to permit one agency possessing decisional authority to obtain written recommendations and advice from a separate agency not possessing such decisional authority without requiring that the advice be any more disclosable than similar advice received from within the agency."). Egan further implies that advice and opinions expressed by one agency to another should be disclosed based upon what motive a requester may impute to such advice or opinions (e.g., "DOE lobbying OGE for a favorable decision"). Egan offers no legal basis for making determinations that the release of documents turn upon such a distinction, however.

With regard to the application of the attorney-client privilege, Egan argues,

> It is not all attorney communications which are privileged, but only those in which legal advice is rendered by an attorney or where confidential communications by a client to the attorney must be protected. Where, as here, differing federal agencies with different interests communicate with one another, and where one agency lobbies another to adopt a position favorable to its wishes, the rational for attorney-client privilege is hardly present despite the facade of having lawyers author the secreted communications. DOE was scarcely providing legal advice to OGE on a matter which DOE presented to OGE for consideration in OGE's sphere of responsibility.

Appeal at 4. Again, Egan proposes that a particular privilege, in this case as to communications between agency clients, such as DOE and NRC, and their attorneys, should not apply "where one agency lobbies another to adopt a position favorable to its wishes, . . ." Egan offers no support in the law for such a narrowing of the privilege, and we find none. Moreover, whether DOE was providing OGE with legal advice is beside the point. As clients, the DOE and NRC were clearly seeking legal advice regarding the application of government ethics laws. Thus, facts provided by these clients to their attorneys in order to obtain such advice are clearly protected by the attorney-client privilege.

As discussed in more detail below, we find that the specific documents at issue are protected by both the deliberative process and attorney-client privileges. As the court in *Mead* notes,

> With respect to documents containing legal opinions and advice, there is no doubt a great deal of overlap between the attorney-client privilege component of exemption five and its deliberative process privilege component. The distinction between the two is that the attorney-client privilege permits nondisclosure of an attorney's opinion

> or advice in order to protect the secrecy of the underlying facts, while the deliberative process privilege directly protects advice and opinions and does not permit the nondisclosure of underlying facts unless they would indirectly reveal the advice, opinions, and evaluations circulated within the agency as part of its decision-making process.

Id. at 254 n.28.

1. Electronic Mail Messages

Of the 58 pages at issue here, 12 (pages # 37-48) are printouts of electronic mail, each of which was withheld in part from Egan. All of them concern drafts of the OGE opinion letter. These mail messages are clearly pre-decisional in that they predate the issuance of the OGE opinion on July 31, 2002. Each of the messages also reflects the give-and-take of the consultative process, in which opinions were expressed and issues raised regarding portions of the OGE opinion while it was being drafted. Thus, at least portions of these documents are protected by the deliberative process privilege. These messages also contain facts supplied by the client for the purpose of seeking legal advice, as well as opinions of attorneys that are reflective of those facts, and are therefore protected by the attorney-client privilege as well.

Nonetheless, we find that the following small amounts of segregable material in some of these pages, in addition to the portions of the documents already released, are not protected by either the deliberative process or attorney-client privilege, and should therefore be released to the requester.

page # 37 "We reviewed your suggested language."

page # 39 "Following is draft language Susan and I developed for your review."

page # 41 "Following is draft language Susan and I developed for your review."

page # 43 "Following is draft language Susan and I developed for your review."

page # 44 "Following is draft language Susan and I developed for your review."

page # 46 "and let me know what you think." (identical phrase already released on page # 47)

page # 48 "and let me know what you think."

2. Draft Versions of the OGE Opinion Letter

Also withheld in part from the requester were five draft versions of the OGE opinion letter (documents numbered 33, 34, 36, 38, and 39 in the documents index provided to the requester). In the case of each document, the body of the draft letter was withheld. These drafts obviously contain specific opinions and issues raised by the author(s) of the drafts. Moreover, releasing various draft

versions of this document, one that has been released in final form, would essentially provide a "roadmap" of the government's deliberative process. *See Dudman Communications Corp. v. Department of the Air Force*, 815 F.2d 1565, 1568 (D.C. Cir. 1987) ("Congress enacted Exemption 5 to protect the executive's deliberative processes -- not to protect specific materials."); *National Wildlife Fed'n v. United States Forest Serv.*, 861 F.2d 1114, 1122 (9th Cir. 1988) ("To the extent that National Wildlife seeks through its FOIA request to uncover any discrepancies between the findings, projections, and recommendations between the draft Forest Plans and draft EISs prepared by lower-level Forest Service personnel and those actually adopted in the final Forest Plan and EIS published by the Forest Service, it is attempting to probe the editorial and policy judgment of the decisionmakers. Materials that allow the public to reconstruct the predecisional judgments of the administrator are no less inimical to exemption 5's goal of encouraging uninhibited decisionmaking than materials explicitly revealing his or her mental processes."); *Horsehead Indus. v. EPA*, No. 94-1299, slip op. at 19 (D.D.C. Oct. 1, 1996) ("Comparing the draft with the final version ultimately adopted by the agency would provide the requester with a picture window view into the agency's deliberations, the precise danger that Exemption 5 was crafted to avoid."). The withheld portions of these drafts are therefore protected by the deliberative process privilege of Exemption 5.

3. Handwritten Notes by DOE Attorneys

DOE/GC withheld, in their entirety, 9 pages of handwritten notes by two DOE attorneys. We agree with DOE/GC that these notes contain privileged material. The notes are protected by the deliberative process privilege to the extent that they contain descriptions of conversations between personnel discussing the subject matter of the OGE draft opinion, prior to the issuance of OGE's opinion on July 31, 2002. The notes also contain facts supplied by clients and discussions of issues that reflect those facts, and therefore the notes are also protected by the attorney-client privilege.

However, upon review of the document, we find that the following small portions of segregable material within these documents are not protected by either the deliberative process or attorney-client privilege, and should therefore be released to the requester.

page # 120[3] "OGE/YM Ethics"

page # 121 "3-15-02 Amy Comstock - OGE"

page # 123 "Marilyn - OGE Head . ."

page # 124 "@ OGE w/ Marilyn Glynn, Rick Thomas, & Allison George. NRC - John Szabo & Tripp Rothschild. Yucca - Susan Rives. DOE - Susan, Gregg, & me." "Rick:" "Trent:" "Trent:" "Susan:"

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[3] This page also contains handwritten notations (the bottom 4-5 lines of handwritten text on the page) that are clearly personal in nature and in no way concern the OGE opinion letter. This portion of the page is therefore not responsive to the Appellant's request.

C. Segregability of Non-Exempt Material

The FOIA requires that "any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt . . . ." 5 U.S.C. § 552(b); *see also Greg Long*, 25 DOE ¶ 80,129 (1995). In the present case, of the 58 pages at issue, DOE/GC withheld only 9 pages in their entirety, and released segregable portions of the remaining documents. In addition, as discussed above, we find that a small amount of additional non-exempt material may be released. Beyond this, we find that any exempt material is so inextricably intertwined that disclosure of it would reveal "only essentially meaningless words and phrases," and therefore need not be released. *Neufeld v. IRS*, 646 F.2d 661, 663 (D.C. Cir. 1981).

D. Public Interest

DOE regulations direct the agency to release responsive, exempt material if the DOE determines such release to be in the public interest. 10 C.F.R. § 1004.1. In its appeal, Egan contends that

> DOE recites this requirement in its initial determination letter and then wholly fails to adhere to it. DOE merely states that it balanced the public interest in disclosure against the adverse effect of disclosure and concluded that the public interest in disclosure did not outweigh the adverse impact of disclosure. The only further rationale provided (to wit, that public disclosure inhibits free and candid discussion) would apply to any and all federal agency deliberative documents, and would effectively eliminate the mandate to make available even exempt documents, when it is in the public interest to do so.

Appeal at 2-3. First, we note that 10 C.F.R. § 1004.1 does not create a presumption that information exempt under the FOIA should be released. Rather, the regulations direct release of otherwise exempt material only upon a determination that such a release would affirmatively be in the public interest. DOE/GC clearly did not find that discretionary release of additional material would be in the public interest. Determination Letter at 2-3. Egan attempts in its appeal to make a case for the public interest in such a discretionary release.

> Because the Yucca Mountain candidate repository would be a unique, first-of-its-kind dumping ground for the most dangerous high-level waste from over 100 nuclear plants throughout the United States, it is axiomatic that the public has an enormous interest in all significant decisions relating to that proposed dumping ground and its licensing. Where, as here, the documents (determined by DOE to be unworthy of public interest) focus on the issue of whether former federal employees who worked on that very project may be precluded from testifying at an NRC licensing hearing for interested stakeholders, the compelling need for discretionary disclosure under 10 C.F.R. 1004.1 is apparent. Where, as here, the anticipated applicant for a license to operate such a facility is in the position of lobbying the [OGE] (successfully) for a determination that precludes stakeholders from using former DOE employees as witnesses, the public interest in starkly evident. Such a determination silences the

> voices of those most familiar with the project and the issues in the licensing proceeding - all federal employees whose efforts were paid for with tax dollars. For DOE under these circumstances to reject its mandate of discretionary disclosure in the public interest, is arbitrary and capricious and calculated to protect the agency from open disclosure of information which is true, but may be embarrassing to, or inconsistent with the position of, DOE.

Appeal at 3. We agree with Egan that there is a strong public interest in the siting of a national nuclear waste repository. We also agree that there is a public interest in the decision by OGE as set forth in its July 31, 2002 opinion letter. This should not be confused, however, with the public interest in the release of the exempt material in the present case. The stated basis for OGE's opinion is set forth in its July 31, 2002 letter, which has already been released. The question, therefore, is the extent to which the public interest would be served by disclosing the details of the deliberative process by which OGE's decision was reached.

In the very short term, making an agency's deliberative process completely transparent might indeed serve the public interest and be consistent with the philosophy underlying the FOIA statute. The impact on future deliberations would be severe, however. Even assuming, *arguendo*, that the information in question might be "true, but may be embarrassing to" DOE, does not tilt the balance of public interest in favor of disclosure. The frank and independent discussion that is vital both to governmental deliberations and to the attorney-client relationship depends upon the assurance that participants in the privileged communications need not censor themselves for fear that those communications be made public. This is clearly no less true (and perhaps more so) of communications containing the kind of unpleasant truths that attorneys need to hear from their clients and decision-makers need to hear from their subordinates. Not respecting these privileges would therefore run counter to the public interest, not only because of the direct damage done to the attorney-client relationship and the quality of governmental deliberations, but also because the chilling effect would in the long run make government decision-making less transparent.

III. Conclusion

We will remand this matter to DOE/GC for a new determination releasing additional non-exempt information to the requester, as set forth in detail above. In all other respects, we will deny the present Appeal.

It Is Therefore Ordered That:

(1) The Freedom of Information Act Appeal filed by Egan & Associates on April 4, 2003, OHA Case Number TFA-0027, is hereby granted as set forth in Paragraph (2) below and is denied in all other respects.

(2) This matter is hereby remanded to the Acting Assistant General Counsel for General Law of the Department of Energy for the issuance of a new determination in accordance with the instructions set forth above.

(3) This is a final order of the Department of Energy from which any aggrieved party may seek judicial review pursuant to 5 U.S.C. § 552(a)(4)(B). Judicial review may be sought in the district in which the requester resides or has a principal place of business, or in which the agency records are situated, or in the District of Columbia.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 22, 2003